1992

Utah Department of Transportation v. 6200 South Associates, a General Partnership; H. Roger Boyer, Kem C. Gardner, and Valley Mortgage Corporation, Beneficiary: Petition for Rehearing

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff and Appellee, v. 6200 SOUTH ASSOCIATES, a General Partnership; H. ROGER BOYER, KEM C. GARDNER, and VALLEY MORTGAGE CORPORATION, Beneficiary, Defendants and Appellants.	:	Case No. 920268-CA Priority 16

6200 SOUTH ASSOCIATES'

PETITION FOR REHEARING

&

SUPPORTING MEMORANDUM

Appeal from the Third Judicial District Court, Salt Lake County, The Honorable Pat B. Brian Presiding

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PETITION FOR REHEARING

The appellants, 6200 South Associates, Roger H. Boyer and Kem C. Gardner ("Associates") herewith respectfully petition this Court pursuant to Utah Rule of Appellate Procedure 35 to rehear specific issues involved in the appeal and addressed, in part, in the Court's Slip Opinion of March 23, 1994. Upon further consideration, the Slip Opinion should be partially set aside and the judgment of District Judge Brian reversed for prejudicial error in law with the case remitted to the District Court for a new trial on issues of Just Compensation.

This Petition will address only two questions addressed in the main appeal and in the Opinion of March 23, 1994:

(1) Did the Slip Opinion misunderstand or misinterpret the testimony and record of trial that the Clinger testimony, involving aerial photographs of highway interchanges in Salt Lake and Davis Counties, failed to identify a single property, property access, size, shape, loss of access, or any factual data, whatsoever, that would have allowed the expert to conclude that these were "access-comparable properties"?

(2) Was the cutting off of Associates' cross-examination of UDOT's expert in the use of hypothetical questions on the most critical and sensitive issue in the entire trial, prejudicial and not mere harmless error?

These sections of the March 23, 1994 Slip Opinion were, we respectfully submit, either factually misunderstood by the Court or erroneously applied. In either event, a rehearing is required to avert a manifest miscarriage of justice.

BASES FOR PETITION

The issues raised in this Petition are of grave consequence to the entire body of law on business and economic damages in this State particularly in the field of eminent domain.

1. The Testimony On Undefined "Comparable Access" Properties.

The issue at pp. 7-10 of the Slip Opinion involving admissability of testimony and aerial photographs of totally unknown properties leaving the court and jury to speculate as to how and in what manner access restrictions, if any, were comparable to the access restrictions of the subject property, is of immense importance to the analysis and development of expert damage testimony in this State. When an expert is confronted, either on voir dire or cross-examination, as to an alleged basis of comparability, viz., in this case, access-comparability of another property of which he has told the jury on direct examination, and the witness admits that he knows nothing of the property, its access characteristic, its size, its ownership, its use, its impaired use vis-a-vis the freeway interchange, that testimony cannot stand. The reason is simple but profound . . . it requires the jury, as well as the Court, to speculate and conjecture as to just how this allegedly "access-comparable property" is, in fact, comparable. The witness, Clinger, had not even seen the so-called access-comparable properties except by an aerial view.

If the Court permits this evidence to pass muster under the feckless statement of the witness that he "considered the photographs as part of his larger appraisal", the Court will have driven a splitting wedge into the solid oak precedent that an

expert must at least be able to identify basic property characteristics as a predicate for the opinion on access-comparability.

2. Cross-Examination Is Harmless Error.

As to the issue of whether being blocked out from cross-examining an expert witness as to a series of hypothetical questions is prejudicial (Slip Op. at 10-12), the Court should look at the impact that its decision will have upon the trial Bar of this State. When a jury is told that hypothetical questions testing the accuracy of the expert's opinion is inadmissible and trial counsel is placed under a virtual quarantine of pursuing hypothetical questions on the most critical question in the entire case, can it be genuinely said that the preclusion of the examination was not prejudicial? Would this new rule of "harmless error of hypothetical questions on cross-examination" apply to criminal cases as well as civil? This Court has recognized the principle of law that full and open cross-examination is the sine qua non of a fair hearing, particularly of trained and wise experts who have been schooled in the art of socratic examination? What message does the Slip Opinion send to a party the size of UDOT to make a baseless, almost fatuous, objection to disrupt critical cross-exam . . . it may be worth a try because, even though erroneous, it could be swept under the carpet as harmless and de minimis error.

These issues are of extraordinary importance to the Bench and the trial Bar of this State and, it is submitted, should be addressed on rehearing.

SUPPORTING MEMORANDUM

I

THE CLINGER TESTIMONY AND EVIDENCE ON AERIAL PHOTOGRAPHS OF ALLEGEDLY COMPARABLE ACCESS PROPERTIES

On page 7 of the Slip Op., the panel addresses the issue of Clinger's testimony surrounding aerial photographs of properties on freeway interchanges which supposedly had comparable access restrictions to the remanent access of the subject property AFTER condemnation. The Court cited Redevelopment Agency v. Mitsui Investment, Inc., 522 P.2d 1370 (Utah 1974), on the question of the evidentiary foundation to meet the test of "reasonable comparability," but distinguished Mitsui from the instant case because it dealt with "comparable sales" (italicized by the Court in the Mitsui quote) whereas UDOT's expert only used the photographs to establish "comparable access limitations."

The panel Opinion then states, even assuming the application of the Mitsui principle, there appeared to be sufficient foundation in regard to the photographed properties establishing "reasonable comparability" of access and configuration. Thus, the Opinion winds up on the note that with wide latitude given to expert appraisers to determine fair market value, the trial court did not err in admitting the photographs of the "comparable access properties."

The Court will search the entire record of Clinger's examination in vain to find one scrap of evidence in which the witness, in describing the location of the properties on the freeway interchanges, could identify a single property that had access characteristics at all, much less those that were reasonably

comparable to that of the access remaining to the subject property. What this record will show plainly is that the witness Clinger, on voir dire and cross-examination,

> could not identify any particular or a single property claimed to be access-comparable;
>
> could not identify the configuration or the nature of the access to a single property in the photographs;
>
> could not identify how the properties in the photographs were accessed, if at all, from primary or insular roads;
>
> could not identify even so much as a single ownership in the photographs;
>
> could not identify whether any of the properties had been partially taken by UDOT and all the primary access expropriated as in the subject case;
>
> could not identify whether the photographs showed properties which had been impacted by access restrictions due to interchange construction;
>
> could not identify whether the properties had been rezoned, downzoned, or their highest and best use changed as a consequence of access limitations.

In short, Clinger could not tell Judge Brian and the jury anything at all about any properties, access situs, ownership, size, shape, use, difficulties of use, or any aspect of the photographed properties. Clinger knew nothing of them, whatsoever. All Clinger knew was that there were some unknown, undefined properties with undefined access near interchanges in Salt Lake and Davis Counties.

How can this Court possibly say in light of this conspicuous absence of a scintilla of evidence as to what properties the witness was even talking about, that an "adequate foundation" was laid for admissibility? Does not the conclusion in the Slip Opinion as to this critical issue send a message to UDOT and every

other government agency (as well as property owners) that an expert can simply get up and show photographs of an area including a polyglot of unknown properties without being able to tell the Court and jury a single fact as to any of the photographed properties or characteristics that are access-comparable. If permitted to stand, the Slip Opinion will be read as establishing a new rule in Utah overturning authority stemming back to the 1961 case of State Road Comm'n v. Peterson, 12 Utah.2d 317, 366 P.2d 76 (1961). It will open up a flood gate for incompetent testimony to be masqueraded before a court and jury under the guise of expert evidence.

If the witness, Clinger, had identified and given appropriate foundation for the properties and delineated the access limitations which those properties had vis-a-vis the freeway interchange, a "sale" would not be required in order for the photographed transaction to be admissible. It could have come in evidence for purpose of establishing "comparability of access" vis-a-vis comparability of sale value. But Clinger had not a scintilla of information about the properties. It is this turn key issue which the Panel Opinion may have misunderstood or did not fully consider. It should do so on Reconsideration.

II

THE EXCLUSION OF HYPOTHETICAL QUESTIONS ON CROSS-EXAMINATION OF UDOT'S EXPERT, VAN DREMMELIN, WAS HIGHLY PREJUDICIAL AND REQUIRES, ITSELF, A NEW TRIAL

The art of cross-examination of an expert witness is sensitive and difficult business. It is the crown jewel of the trial lawyer and the only effective means that he or she has to penetrate the glorious achievements and medals of the expert witness. The apotheosis of the expert is direct exam where he parades his resume

and infinite experience. It is cross-examination when the hour of truth is at hand. The effectiveness of that cross depends not only upon mouthing any question at any time on a particular subject, but the articulacy, timing and context of the question are of vital importance.

Van Dremmelin was a seemingly skilled, polished and effective witness who came into the courtroom after 4 days of trial and told the jury that the Associates' property was actually better-off because of the condemnation of all of its primary access to the north and west, then it was prior to condemnation. This was a monstrous claim and one that had to be met with the most scrutinizing and effective cross-examination. What the trial court did was not only to cut-off hypothetical questions on cross-examination by Associates' counsel, but in doing so, effectively admonished the jury that hypothetical questions involving assumed properties not before the trial court, were irrelevant and not to be considered in giving weight to the evidence. The hypothetical question of counsel for 6200 South Associates, at the time UDOT's objection was sustained, was a prelude to a line of examination of hypotheticals in which one principle built on a previous principle and so on. Had the cross-examination been permitted (as this Court said it should), Van Dremmelin would have been forced to concede that the loss of all primary access with only back-door ingress and egress left after condemnation was a severe restriction in the typical case. What made this property atypical, would have been the concluding question. But that was cut-off by the trial judge sustaining the UDOT objection, an objection which this Court found to be plainly erroneous.

Certainly if the area of cross-examination that was blocked-out involved a preliminary or relatively unimportant issue, there would be the basis for a possible finding of "harmless error" in the overall context of the full trial. But that is not this case. The area in which cross-examination was blocked was in the most critical and sensitive area of the entire case -- what had happened to this property as a result of all of its primary access having been condemned. Limitation of cross-examination on this epic issue was highly prejudicial and damaging, at the least.

It will not do, we respectfully submit, to say that some cross-examination ultimately was allowed as to a non-hypothetical property. To a minor degree, the Panel Opinion's observation is correct. But to a major degree, it is fundamentally inaccurate because the hypothetical could not be fully constructed in the later example. The precedent of the Supreme Court in State v. Peek, 265 P.2d 630, 637 (1953) must weigh overwhelmingly on this point:

> There is no other instrument so well adapted to discovery of the truth as cross-examination, and as long as it tends to disclose the truth it should never be curtailed or limited. (Emphasis added).

Is it to be the law of this Court that Peek doesn't mean what it says and that when cross is blockaded by objection on the critical question of the trial, the matter falls in that dismal catalogue of harmless error? We respectfully submit not.

CONCLUSION

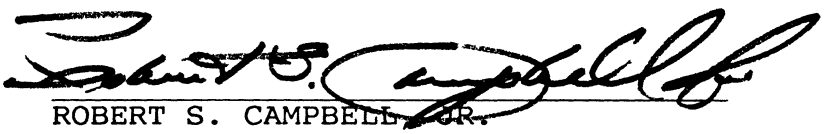
Associates recognizes that Petitions for Rehearing are not favored. But the issues raised in this Petition are essential and if permitted to stand under the Slip Opinion, will present great

difficulties for the Bench and Bar relative to the foundation for expert testimony and the genuine importance of cross-examination of an expert.

It is respectfully submitted that a rehearing should be granted as to the two issues raised in this Petition and that upon rehearing, the Judgment of the District Court should be reversed as to both issues and the case remitted for a new trial on compensation and damages.

DATED this 6th day of April 1994.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Campbell Maack & Sessions, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah, and that in said capacity and pursuant to the Utah Rules of Appellate Procedure, true and correct copies of the 6200 South Associates' Petition for Rehearing & Supporting Memorandum were served upon:

Donald S. Coleman, Esq.
Assistant Attorney General
236 State Capitol Building
Salt Lake City, UT 84114

by U.S. mail, postage prepaid, this 6th day of April 1994.

CAMPBELL MAACK & SESSIONS